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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 237

BENJAMIN RICHMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BENJAMIN RICHMAN,
HAROLD SIMANDL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 237

BENJAMIN RICHMAN,
Petitioner, Appellant Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner Benjamin Richman, respectfully represents:

I

Summary Statement of Matter Involved

A. Petitioner was called to trial in the United States District Court for the District of New Jersey (together with one Nathan Gollin) upon an indictment that contained two counts, the first count in substance charging: that "on

or about the 15th day of June, 1946, at Newark, in the District of New Jersey, he and said Nathan Gollin did knowingly, * * * steal, take and carry away from a certain automobile truck, in the custody and possession of P. Ballantine & Sons, with intent to convert to their own use, * * * 600 cases of bottled beer, * * * shipped by P. Ballantine & Sons, at Newark, New Jersey, and consigned to Charles Luberger at North Tarrytown, New York, in the course of shipment in interstate commerce, all of which said goods and chattels were then and there in the custody and possession of P. Ballantine & Sons at Newark, aforesaid, and not as yet delivered to the consignee and which said goods and chattels were moving as, formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce; and the second count in substance charging: that they did on the same day at Keansburg, New Jersey, receive and have in their possession said beer, well knowing the same to be stolen, in violation of Title 18 U. S. C., Section 409, 1940 ed." (R. 6.)

B. Petitioner's contention requires a brief statement of the evidence. P. Ballantine & Sons Brewery occupies nine or ten complete city blocks adjoining each other near the outskirts of the City of Newark, New Jersey, and it uses the public streets of the city surrounding the blocks occupied by its brewery buildings in the convenient conduct of its business. For example, there is a shipping and loading plant occupying a whole block which faces on Freeman Street, known as Plant 2. There is another shipping and loading plant further south on the same street, known as Plant 1. The north side of the brewery is bounded by one of the main arteries of travel in this vicinity, running along the edge of the Passaic River, and known as Raymond Boulevard. The south side of the brewery is bounded by another main artery of travel, known as Ferry Street. The blocks occu-

pied by the brewery buildings are bisected between Raymond Boulevard and Ferry Street by a street known as Fleming Avenue. The large garage maintained by the brewery is between Freeman Street and Christie Street and bounded on the south by Ferry Street. The locations of the buildings occupied by the brewery are fairly well described by Mr. Carl Horn, the assistant general transportation manager of the brewery, on R. 49 and 50.

The first witness called by the government at the trial was one Borowsky, who went to work at 8:30 in the evening of June 14, 1946, and quit at 5:30 o'clock in the morning of June 15th. (R. 11.) A vehicle known as a trailer, and bearing the number "327" was backed into the loading platform at plant No. 2. It was "a canvas job, rack body." (R. 11.) There it was loaded and checked by one Baumgartner before midnight of June 14th, and left at the loading platform of Plant 2. (R. 82, 87.) The checker was required to note upon the checker sheet (Ex. G-7) (R. 130) whether or not the truck needed repairs.

After this particular vehicle was loaded and certain papers, such as Ex. G-5 and 6 (R. 126, 128) were prepared, the checker secured a bill of lading from the dispatcher's office across the street from the loading platform. The loaded vehicle could stay at the loading place (if it did not need repairs), but if it were in the way of other loading operations of other trucks and trailers, it was removed. (R. 30.) Of course, if the vehicle needed repairs, it was removed to the garage. (R. 39.) In the instant case, it was in the way of other loading operations, and in the early hours of June 15th, Borowsky moved the trailer after it had been loaded, to a spot on Freeman Street in front of the garage of the company (described above), and hung the key to the tractor which moves the trailer, in the garage, and placed in the keyring the bill of lading. (Ex. G-1), (R. 124, R. 31, 32.)

One more thing was done before the vehicle left the loading platform, and that was to have the doors of the trailer sealed. Borowsky testified (R. 13) that the seal was a regular licensee's seal, "ICC seal, I imagine" (R. 13), but later on he testified that he did not put the seal on and that all the seals were alike, whether sealing was being done for intrastate or interstate journeys. (R. 83.)

Another part of the operation of starting a vehicle on its journey was the selection of drivers for each tractor or truck. As most of the loading operations were done at night, all drivers of P. Ballantine & Sons went to the bottle house, which is one of the buildings of P. Ballantine & Sons, on Christie Street south of Ferry Street, in which bottle house there is a washroom, and in that washroom the Assistant Delivery Superintendent, before four o'clock every afternoon, posted a schedule setting forth the trucks and trailers of P. Ballantine & Sons that were to be loaded during the night, and giving the names of the driver or drivers who were to drive them away in the morning after being loaded. The journey, either intrastate or interstate, does not commence until the arrival of the driver in the morning. He first ascertains the location of his truck or trailer, whether in one of the yards or on the street (R. 77 and 35), and then secures the key to the vehicle that he is to drive, as well as a bill of lading. He does not start his journey until seven o'clock or later of the following day. He has not only to secure the key and bill of lading, but before he leaves he goes to the garage to "sign out" for the vehicle that he is to drive away. The key might be either at the dispatch office on Christie Street or at the garage on Freeman Street. (R. 77.) In the instant case the key and bill of lading were in the garage.

There is a daily record kept of the time company vehicles come in and the time they go out (R. 75) and before a vehicle leaves either from one of the company yards or the

street on which it is parked, the driver must sign a "time card" showing when he started on his journey. If repairs are needed, the vehicle is taken to the company garage on Freeman Street and a record of this is made on the checker's sheet. (Ex. G-7, R. 130, 30, 60.)

The theft of the trailer was discovered by Borowsky in the early hours of the morning of June 15th, when he brought around another trailer to be parked behind "327" on Freeman Street, (R. 151, 160) and subsequently the contents of the trailer (600 cases of steines) were found at Keansburg, New Jersey, and were sold by petitioner, Richman, defendant Gollin standing by.

Petitioner and defendant Gollin rested without offering any testimony and made motions for judgment of acquittal on the ground that the government failed to prove that the shipment was moving as or formed a part of or constituted an interstate shipment. The motions were denied by the Trial Court. (R. 92, 103.)

Petitioner and the defendant, Gollin, were found guilty on both counts of the indictment and each sentenced to two years on the first count and two years on the second count, to run concurrently. (R. 4.)

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit upon the grounds: (1) that the Trial Court erred in denying the several motions for judgments of acquittal; (2) that the Trial Court erred in its instruction to the jury. The Circuit Court of Appeals affirmed, Judge McLaughlin dissenting in part.

II

Jurisdictional Statement

An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which on June 22, 1949, affirmed the judgment of the District Court for the District of New

Jersey. The opinion of the Court below has not yet been reported but appears shortly following (Record p. 135).

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254 (1) effective September 1, 1948 and Rule 37 (b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

Pursuant to Rule 37 (b) (2) of the Federal Rules of Criminal Procedure, petitioner applied for an extension of time within which to file his petition, and on July 18, 1949, Mr. Justice Burton ordered that the time for filing his petition for writ of certiorari be extended to and including August 8, 1949. (See Appendix.)

III

Questions Presented

The questions presented are:

(1) Whether it is an offense under the statute (Title 18 U. S. C. 409, 1940 ed.) to steal goods that have been "constituted as an interstate shipment" that is, goods that have been merely segregated for shipment in interstate commerce, but which have not as yet entered or have not actually moved, in interstate commerce?

(2) Whether the statute Title 18 U. S. C. 409, (1940 ed.) denounces as an offense not only the stealing of goods from a shipment actually in interstate transit, but also the stealing of goods which "constitute an interstate shipment," that is, a shipment which has been segregated for interstate commerce but which has not as yet entered or has not as yet actually moved, in interstate commerce.

(3) Whether the defendant could be convicted and punished where the indictment charged the stealing of merchandise "in the course of shipment in interstate com-

merce" and which was "moving as, formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce"—and also charged the receiving of same, in violation of Title 18 U. S. C. 409, 1940 ed., and the proof merely established that at the time of the theft, merchandise had been "constituted as an interstate shipment", that is, merely segregated for shipment in interstate commerce and had not as yet entered or actually moved in interstate commerce?

(4) Whether under an indictment which charged the stealing of merchandise "in the course of shipment in interstate commerce" and which was "moving as, formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce"—and also the receiving of same, in violation of Title 18 U. S. C. 409, 1940 ed., the jurisdiction of the Federal Court was established, by proof, that the merchandise was loaded by the seller, as shipper, upon its own truck, a bill of lading prepared, and the loaded truck, for convenience, put to one side by the loader, to await the arrival of the shipper's employee, who at some later time, after "checking in" and receiving permission to "sign out", was to drive it to another State; and many hours before the arrival of such designated driver, the loaded truck was stolen?

(5) Whether under an indictment which charged the stealing of merchandise "in the course of shipment in interstate commerce" and which was "moving as, formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce"—and also charged the receiving of same in violation of Title 18 U. S. C. 409, 1940 ed., the Trial Court was justified in denying a motion for judgment of acquittal, and the Circuit Court of Appeals justified in sustaining such action, where the proof was that the merchandise was loaded by the

seller, as shipper, upon its own truck, a bill of lading prepared, and the loaded truck, for convenience, put to one side by the loader, to await the arrival of the shipper's employee, who at some later time, after "checking in" and receiving permission to "sign out", was to drive it to another State: and many hours before the arrival of such designated driver, the loaded truck was stolen?

(6) Whether there was sufficient competent testimony of petitioner's guilt to justify the submission of the case to the jury?

IV

Reasons For Allowance of the Writ

(1) The Circuit Court of Appeals erroneously decided that the statute (Title 18 U. S. C. 409, 1940 ed.) denounced as a crime against the United States the stealing of goods that have been "constituted as an interstate shipment" that is, goods that have been merely segregated for shipment in interstate commerce but which have not as yet actually moved in interstate commerce. The pertinent part of the statute is as follows:

> "• • • whoever • • • shall steal • • • from any • • • truck or other vehicle • • •, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen • • • shall • • • be • • • imprisoned."

Although it has been part of the statute in question since February 13, 1913 and many Circuit Courts have had occasion to construe it, no other court has attributed to it the meaning that was afforded it by the court below in this case. This Court has never construed it.

The decision in the case at bar conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *O'Kelley* v. *United States*, 116 F. (2d) 966, 967, where that Court held:

> "A common law larceny is not in itself a federal offense. It is an offense only when the property taken is at the time of the theft a part of an interstate or foreign shipment of freight. As the subject of the larceny here did not when taken constitute an article of interstate commerce, it was not within the protection of the Federal statute."

It is also in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Kaplan*, 156 Fed. (2d) 922, 921, where that Court held:

> • • • "The judge, in his instructions, said, 'This case involves five separate charges of knowingly receiving and having in possession goods which had been stolen and which goods prior to the time they were stolen, were part of an interstate shipment of freight.' This comment underscored the defect in the form of the indictment. The judge should have told the jury that appellant could be found guilty only if it found from the evidence that the goods were still moving in interstate commerce when the theft occurred."

It is also in direct conflict with a decision of the Circuit Court of Appeals for the Second Circuit in *White et al.* v. *United States*, 273 Fed. (2d) 517, 518 where that Court held:

> "The act of Congress on which this indictment is based does much more than extend the crime of larceny to interstate or foreign shipments. If that were all the act attempted, it would be wholly unnecessary; for no one can doubt that the crimes of larceny, robbery, or the like can as well be performed upon goods traveling from one state to another as upon those in

their owner's warehouse, or on such owner's person, and such crimes could be and have been punished under state laws.

The essential object of this statute is to create, define, and punish the offense of abstracting or unlawfully having in possession goods while in interstate or foreign transit, and thereby interfering with interstate or foreign commerce. Under such a statute both counts of this indictment are sufficient, in that they describe the goods, specifically allege that they were in interstate transit, and give the name of the consignee and the locality of the offense."

It is also in conflict with a decision of the Circuit Court of Appeals for the First Circuit in *Friedman* v. *United States*, 233 Fed. 429, 430; the decision of the Circuit Court of Appeals for the Sixth Circuit in *Kasle* v. *United States*, 233 Fed. 878; and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Lowery et al.* v. *United States*, 271 Fed. 946.

The statute also provides a jurisdictional prerequisite that the goods be stolen from one of certain designated places, viz: a railroad car, station house, platform, depot, wagon, automobile, truck or other vehicle. *Wolkoff* v. *United States*, 84 Fed. (2d) 17, (C. C. A. 6, 1936). This is a list of places in which merchandise might be expected to be found which were in the course of transit.

The part of the statute in question has been incorporated into Section 659 of Title 18 U. S. C., approved June 25, 1948, effective September 1, 1948. In arriving at its conclusion, the Court below leaned heavily upon the last sentence of the statute which defines the word "truck," etc. This definition is not included in Section 659. The revisor's note to that section being as follows:

"The definitions of 'station house', 'depot', 'wagon', 'automobile', 'truck', or 'other vehicle', contained in

said section 409 of title 18, are omitted as unnecessary."

(2) The Circuit Court of Appeals erroneously decided that under the indictment (R. 6) the petitioner could be convicted and punished, although the proof merely established that at the time of the theft, the merchandise had been "constituted as an interstate shipment," that is, merely segregated for shipment in interstate commerce and had not as yet actually moved in interstate commerce. As Judge McLaughlin pointed out in his dissenting opinion:

> "The only offense the indictment charges and the only offense for which these appellants could be convicted under it, is that the beer constituted an interstate shipment, the interstate movement of which had already begun."

An allegation in an indictment which describes, defines, qualifies or limits a matter material to be charged, is taken as a descriptive averment, and the rule is that it must be proved as laid, even though such particularity of description was unnecessary. *Kutler* v. *United States* (C. C. A. 3), 79 Fed. (2d) 440, 442.

Petitioner could only be tried upon the indictment as found by the grand jury and especially upon all its language found in the charging part of that instrument. *Ex parte Bain*, 121 U. S. 1, 10.

(3) The Circuit Court of Appeals erroneously decided that the theft of the beer in question took place while it was actually moving in interstate commerce. The Court's decision is based primarily upon its conclusion that interstate movement began when the loader, merely to get it out of the way of other loading operations of other trucks, drove the loaded tractor and trailer from the loading platform and parked it at a convenient spot on the street, to await the

arrival of the driver who had been designated, to take it upon the interstate journey.

The ruling of the Court below is in direct conflict with the decision of this Court in *Hughes Bros.* v. *Minnesota*, 272 U. S. 469, 475, 476, wherein this Court said:

> "Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has *actually begun* and is going on." (Italics supplied.)

It is also in conflict with the decision of this Court in the case of *Coe* v. *Errol*, 116 U. S. 517 wherein this Court held:

> "*Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State.* It is true, it was said in the case of The Daniel Ball, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' *But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other.* The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is not part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committeed to a common carrier or transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of

> the property, entirely within the State, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether in fieri, and not at all a fixed and certain thing." (Italics supplied.)

It is also in conflict with the decision of this Court in *Hammer* v. *Dagenhart*, 247 U. S. 251. While the decision in this case has in some respects been overruled, the following principles stated at page 272 of the opinion are still the law.

> "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the *actual commencement of its transfer to* another state.' (Mr. Justice Jackson in In Re Green, 52 Fed. Rep. 113). This principle has been recognized often in this court. Coe *v.* Errol, 116 U. S. 517; Bacon *v.* Illinois, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. Kidd *v.* Pearson, 128 U. S. 1, 21." (Italics supplied.)

It conflicts with the decision of this Court in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 231, wherein this Court said:

> "In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station, from which the journey is continued by train; and such a journey ends when he alights from a conveyance near the home, office or hotel which constitutes his ultimate

destination. *Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends* the building by elevator.

But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Swift & Co. *v.* United States, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 S. Ct. 276; North American Co. *v.* Securities & Exch. Commission, 327 U. S. 686, 705, 90 L. Ed. 945, 958, 66 S. Ct. 785. *And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.'* United States *v.* Capital Transit Co., 325 U. S. 357, 363, 89 L. Ed. 1663, 1669, 65 S. Ct. 1176. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another fare." (Italics supplied.)

It is also in conflict with the decision of the Second Circuit in *United States* v. *Fox*, 126 Fed. (2d) 237, where that Court said:

> "Although we have therefore not been able to find any authority precisely on all fours, we are satisfied that at least as soon as the goods have finally left the shipper's possession and have come into the possession of any of those who are to forward them upon an interstate journey, intended to be such from the outset, they become a part of interstate commerce."

It is also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Sharp et al.* v. *United States*, 280 Fed. 86, 88, where that Court said:

> "The destination of the alcohol was fixed and certain from the time the shipper parted with possession and control of it, and the car containing it was launched on its way to another state by being committed to the switching line for delivery to the carrying line."

It is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Wolk* v. *United States*, 94 Fed. (2d) 310, 312, where that Court said:

> "Here the shipper had nothing to do with the delivery of these trunks at the St. Paul terminus of the Bruce Transfer Company. The hotel porter was the agent of the Bruce Company in issuing the bill of lading and in delivering them at the hotel to the Bruce Company itself or any one it might designate. The McCue Company, under its arrangement with the Bruce Company, was so designated and it was merely the agent of the Bruce Company in this transaction. The responsibility of the Bruce Company for these trunks as an interstate shipment began, at least, upon the delivery of them at the hotel to the McCue Company. Such is the actual and the legal situation. Because of this situation, this contention must be ruled against appellant."

According to the normal and accepted course of the company's business, the trailer would not and could not start on its interstate journey, or any other journey, until the driver who had been selected to drive the tractor attached to the trailer, had reported to the brewery the following day or the morning of the same day at 7 o'clock or afterwards to find out where his vehicle was, either at the loading platform or somewhere else, secure his key and "sign out." By "signing out" is meant, that he had to report to someone that he was ready to begin his assigned task and start the journey. Then, if—and only if—he received permission from that someone to "sign out" and he did so, did the interstate journey begin. When he "signed out," he acknowledged receipt and possession of the tractor and trailer and the merchandise, and accepted full responsibility for its safe delivery to the consignee. He had not signed the bill of lading. The loader had signed it, purely for convenience. The company did not intend, that the tractor and trailer and the merchandise be considered as having been turned over to the driver, who was to take same upon its interstate journey, until he, personally, had "signed" for them. The driver knew he could not start upon the interstate journey until he was given permission to "sign out." If for any reason he was not allowed to "sign out," he would not obtain possession of the tractor and trailer, nor would the interstate journey begin. There were practical reasons for this. The checker not only was required to check the load, but also to check the condition of the tractor and trailer and report on his "checker sheet" (Ex. G-7), whether or not they needed repairs. If repairs were needed, it was not left to the driver to determine whether the tractor and trailer were fit to make the journey. The responsibility for that decision rested with the one who gave permission to the driver to "sign out." If extensive repairs were necessary, the beer would have to be unloaded from that par-

ticular vehicle and placed upon another one. If the company desired to divert the shipment, even consigning it to a purely local customer, it could have done so by merely changing the billing. Therefore, until the driver had received permission to "sign out" and had done so, the company had not relinquished possession or custody to those who were to move it in interstate commerce. The gathering of the beer on the platform and placing it in the trailer; the signing of the bill of lading by the loader and his moving the tractor and trailer from the platform purely for convenience, and without intention on his part, or on the part of the company that any kind of a journey or part of a journey was commencing, were "all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." *Coe* v. *Errol, supra.* Since the company used the public streets surrounding its plant as if they were its own private property, the merchandise in the trailer should be considered as being still on the lands where it was produced. Whether or not interstate commerce has commenced is to be determined by what was actually done and not by the mere billing. *Baltimore & O. S. W. R. Co.* v. *Settle,* 260 U. S. 166, 170; *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346, 349; *Texas & New Orleans Railroad Co.* v. *Sabine Tram Co.,* 227 U. S. 111, 126, 127. The language of the statute in question has been incorporated in Title 18 U. S. Code, Section 659, approved June 25, 1948, effective September 1, 1948. That language has never been construed by this Court. The Circuit Courts are in conflict as to its meaning. See *U. S.* v. *Sherman* (C. C. A. 2), 171 Fed. (2d) 619, 622. Clarification by this Court is necessary. The questions—what proof is required to establish the jurisdiction of the Federal Courts under this statute, and—what proof is required in order to convict thereunder—have never been decided by this Court. Those questions are constantly aris-

ing and the lower Courts express conflicting views in answering them. They are questions of large public importance which should be decided by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

BENJAMIN RICHMAN,
Petitioner;

By HAROLD SIMANDL,
Attorney for Petitioner.

APPENDIX

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1949

No. —

BENJAMIN RICHMAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA

ORDER

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for Writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 8th, 1949.

(Signed) HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of July, 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 237

BENJAMIN RICHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and partially dissenting opinions in the Court of Appeals (R. 142-154) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 22, 1949 (R. 155). On July 18, 1949, petitioner's time to file his petition for a writ of certiorari was extended to August 8, 1949, by order of Mr. Justice Burton (See Pet. 2) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the goods which petitioner was convicted of stealing and possessing were goods in interstate commerce within the purview of the Act of February 13, 1913, as amended.

STATUTE INVOLVED

The Act of February 13, 1913, c. 50, 37 Stat. 670, as amended, 43 Stat. 793, 47 Stat. 773 (18 U.S.C. (1940 ed.) 409), provided in pertinent part at the time of the offenses in question here:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *. * * * The words, "station house," "platform," "depot," "wagon," "automobile," "truck," or "other vehicle," as used in this section, shall include any station house, platform, depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

STATEMENT

On December 11, 1946, petitioner and a co-defendant, Nathan Gollin, were indicted on two counts, the first for stealing and the second for receiving and possessing 600 cases of bottled beer, "which said goods and chattels were moving as, formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce" (R. 6-8). The defendants were tried and convicted on both counts. On appeal, the convictions were reversed on the ground that the trial court erred in instructing the jury that as a matter of law the beer was in interstate commerce at the time of the theft; the Court of Appeals held that it was within the province of the jury to believe or disbelieve the uncontradicted testimony as to the loading and movement of the truck from which the beer was stolen. *United States* v. *Gollin,* 166 F. 2d 123 (C.A. 3) . The defendants nevertheless petitioned for certiorari to review the holding of the District Court, affirmed by the Court of Appeals, that the evidence, if believed, established that the beer was in interstate commerce when it was stolen. This Court denied the petition for certiorari. 333 U. S. 875, No. 669, O.T. 1947.

The case was thereafter retried and the defendants were again found guilty on both counts (R. 123). Both were sentenced to two years' imprisonment on each count, the sentences to run concurrently (R. 133, 135). The defendants did not testify in their own behalf.

The uncontradicted evidence showed that during the late evening of June 14 or the early morning of June 15, 1946,[1] a truck of P. Ballantine and Sons was loaded with 600 cases of beer at one of the loading platforms of the company's plant in Newark, New Jersey. The truck was sealed and a bill of lading was made out for shipment to Charles Luberger, Tarrytown, New York. (R. 12-14.) The truck was thereafter checked out and driven two blocks from the loading platform and parked (R. 14-15). The bill of lading and the keys for the truck were deposited on a rack in the Ballantine garage (R. 15). During the early afternoon of June 14, 1946, there had been posted on a bulletin board near the time clock used by the drivers a schedule assigning drivers to the work of the morning of the 15th. On this schedule two drivers were assigned to the truck on which the beer in question was loaded. (R. 70-74.) Customarily, the drivers went to the garage in the morning, picked up the key and the bill of lading from the key rack pursuant to their assignment, checked out and proceeded with their prescribed task of driving the truck to its destination (R. 31-33). The truck in question was stolen some time before the arrival of the drivers assigned to it (R. 15-16).

At the close of the evidence, the defendants having moved for a directed verdict of acquittal and

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[1] The witness Borowsky gave the dates as June 15 and June 16 but it is clear from the record that this was an error and that the 14th and 15th were intended (e.g. R. 40, 42, 66, 69).

the motion having been denied (R. 92-103), the court charged the jury in relevant part as follows (R. 108):

> * * * the burden is upon the Government to prove, if it is to sustain the charge in the indictment, that at the time of the theft the interstate transportation of the merchandise in question had actually commenced.

In response to a question from the jury after they had retired to deliberate, the court stated further in relevant part:

> Now, interstate commerce commences, within the meaning of that definition, when the transfer of the commodity to another state is actually commenced. More simply stated, the merchandise in question is put in commerce with the intent that it shall be delivered to its ultimate destination. The statute requires that the goods shall be, as this suggests, on their way. It doesn't mean that has to be five miles, ten miles, fifteen miles, twenty miles, but it does require that the transportation of the commodity, whatever it is—and here it happens to be a shipment of beer—shall have been commenced. Now, it is difficult to illustrate without encroaching in some way upon what might be your prerogative and I don't care to do it, but you will bear in mind the simple definition which I have taken by the case decided by the Appellate Court, that commerce begins when the transfer of the commodity to another state is actually commenced. [R. 119; see also R. 122.]

The Court of Appeals affirmed the convictions, rejecting the defendants' contention that the stolen goods were not at the time of the theft in interstate commerce within the meaning of the Act. The majority held that under the statute the stealing of property which had been "constituted" as an interstate shipment is as much an offense as stealing goods actually in transit in interstate commerce, that the indictment alleged both that the stolen goods constituted an interstate shipment and were moving in interstate commerce, and that on either theory the evidence was sufficient to sustain the jury's verdict. The majority added that in view of their construction of the statute and the indictment, the trial court's instructions to the jury that the burden was upon the Government to prove that at the time of the theft the transportation of the goods had actually commenced were more favorable to the defendants than they were entitled to under the statute. (R. 148-151, 153.) One judge dissented from the majority's construction of the indictment. He thought that it charged only theft of goods the interstate movement of which had already begun. He did not, however, dissent from the affirmance of the convictions. (R. 153-154.)

ARGUMENT

The multiform statement of petitioner's contention is essentially the same as that presented in the earlier petition for a writ of certiorari which this Court denied. 333 U. S. 875. That position is in substance that the goods had not yet begun to move

in interstate commerce when they were stolen and that consequently the theft did not constitute a crime within the contemplation of the statute under which petitioner was convicted. Much of petitioner's argument challenges the alternative holding of the majority below that the convictions were valid under their construction of the statute as denouncing theft of goods which have been constituted as an interstate shipment as well as goods which have actually entered interstate commerce, and is offered in support of the proposition that proof that the stolen goods had begun to move in interstate commerce was an essential element of the crime (Pet. 8-11). In the context of this case, however, argument of that question is purely academic. The case was submitted to the jury upon the theory that to sustain the charges of the indictment it was necessary to find that at the time of the theft the transportation of the merchandise had actually commenced. The jury's verdict of guilty evidences that it did so find and that finding, we submit, is consistent both with the undisputed evidence and the law.

The evidence shows that a truck was loaded with beer in Newark, New Jersey, destined for a consignee in Tarrytown, New York. The truck was sealed, a bill of lading was made out, drivers were assigned to the truck and the truck was removed from the loading platform to a spot two blocks away, whence the drivers were to take it on its journey several hours later. Before the arrival of the drivers the truck was stolen.

At the time of the theft the interstate shipment of the goods had already begun. It is, of course, true that in some contexts the fact that the owner of the goods was also the carrier has frequently presented some difficulty in ascertaining the precise moment when goods entered the flow of interstate commerce. *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 475-476; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366, 376. But clearly the identity of the owner and carrier does not affect the interstate character of the shipment. *Marifian* v. *United States,* 82 F. 2d 628 (C.A. 8), certiorari denied, 298 U. S. 686; *Friedman* v. *United States,* 233 Fed. 429 (C.A. 1), certiorari denied, 244 U. S. 657.

As we pointed out in our brief in opposition to the earlier petition for certiorari, what happened in effect was that the owner of the goods transferred them from itself as shipper to itself as interstate carrier under a through bill of lading. When the truck had been sealed and removed from the loading platform, the bill of lading made out, the drivers assigned and nothing left but for the drivers to arrive and take the truck, that transfer was completed. It would have been clear that the interstate shipment had commenced if the truck had belonged to an independent interstate carrier, *United States* v. *DeNormand,* 149 F. 2d 622, 624 (C.A. 2), certiorari denied, 326 U. S. 756, or even to an intrastate transfer company. *United States* v. *Fox,* 126 F. 2d 237 (C.A. 2); *Sharp, et al* v. *United States,* 280 Fed. 86, 88 (C.A. 5). The mere fact that the owner of the goods was also the carrier does not re-

quire the application of a different test for determining the time of commencement of the interstate shipment.

It is petitioner's contention that the interstate shipment did not and could not commence until the drivers arrived and signed out (Pet. 16-17). In making this argument petitioner has seized upon a trifling detail upon which to rest the wholly insupportable argument that some circumstance such as the need for repair of the truck or a change in plan might have intervened to defer or cancel the shipment. The possibility of delay in shipment for needed repairs or deferment or cancellation of the trip for other reasons is not peculiar to the owner-carrier alone. It is likewise present when the goods are in the hands of an independent carrier. Yet under the decided cases if the truck had been owned by an independent carrier the interstate shipment would unquestionably have begun upon delivery of the goods to it, notwithstanding either delay in awaiting the arrival of drivers, *Champlain Realty Co.* v. *Brattleboro, supra,* at 376; *United States,* v. *Sheffield Farms Co.,* 43 F. Supp. 1, 5 (S.D. N.Y.), or the possibility of a change in plan resulting in cancellation of the shipment. *Hughes Bros. Co.* v. *Minnesota, supra,* at 475-476.[2]

Beyond the foregoing, petitioner asserts (Pet. 11-15) that the decision below is in conflict with

[2] As to the possible need for repairs relied upon by petitioner, there is no reason to suppose that an interruption caused thereby would have necessitated the conclusion that the interstate shipment had not yet begun. *Champlain Realty Co.* v. *Brattleboro, supra,* at 376. In any event, the checker's sheet

other decisions upon which he relies and which either support the decision below or are readily distinguishable. Thus, *Coe* v. *Errol*, 116 U. S. 517 (see Pet. 12-13), involved a question of interstate commerce only in so far as it affected the right of a state to levy a tax. Apart from the fact that a "ruling as to the extent of a state's taxing power is not conclusive as to the boundaries of interstate commerce for federal purposes" (*United States* v. *Yellow Cab Co.*, 332 U. S. 218, 232; see also *United States* v. *Fox, supra*), the Court merely held that lumber which was held within the state for as long as a year prior to shipment to another state had not yet entered the flow of interstate commerce so as to deprive the state of its taxing power. The opinion, moreover, made it clear (p. 525) that if, as in the case at bar, the goods had actually been started in the course of transportation to another state or delivered to a carrier for such transportation there would have been no question as to their being in interstate commerce.

Hughes Bros. Co. v. *Minnesota, supra* (see Pet. 12), on the other hand, also involved the right of a state to tax goods claimed to be in interstate commerce. A lumber company had cut logs in Minnesota and hauled them to the ice covered Swamp River in the same state. When the ice broke, these

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had been made out prior to the theft (R. 60) and the space for indicating needed truck repairs was left blank (Exhibit G-7, R. 131), so that, whatever the possibilities generally may have been, the truck in this case was scheduled to leave without interruption for repairs.

logs, pursuant to an already existing contract of sale, were to be floated to the border of the state where they were to be picked up by a ship for transportation to a paper company in another state. The hauling of the logs to the Swamp River was completed the latter part of March 1922. The ice broke on April 29, 1922, and by the end of July all the logs had been shipped. The Court in that case, as here, held that the movement to another state had already begun. It said, at pp. 475-476: "The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out." We submit that in the present case, in accord with this holding, the preparation for the journey had been completed and the initial movement in carrying it out had been made.

United States v. *Yellow Cab Co.*, 332 U. S. 218, 228, 230 (see Pet. 13-14), merely decided that the operation of a local taxi cab service, as distinguished from an exclusive service for the carriage of passengers from one railroad station to another in the same city, which the Court held did constitute a part of interstate commerce, was too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. The Court, moreover, pointed out, at p. 231, that "what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted

limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations".[3]

United States v. *Fox, supra, Wolk* v. *United States,* 94 F. 2d 310, 312 (C.A. 8), and *Sharp, et al.* v. *United States,* 280 Fed. 86, 88 (C.A. 5) (see Pet. 15), are not in conflict with the holding below. We assume that petitioner is again urging, as he did in his earlier petition, that the court's statement in each of those cases to the effect that the goods in question entered the flow of interstate commerce at least upon the happening of a certain event is synonymous with or requires the conclusion that interstate movement begins "only" upon the happening of a similar contingency. This, we submit, is a patent *non sequitur.*

Petitioner cites the cases of *Baltimore and O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, *Western Oil Refinining Co.* v. *Lipscomb,* 244 U. S. 346, and *Texas and New Orleans Railway Co.* v. *Sabine Tram Co.,* 227 U. S. 111, for the proposition, which we do not challenge, that "whether or not interstate commerce has commenced is to be determined by what was actually done and not by the mere billing" (Pet. 17). It is our contention, in fact, that in the instant case the billing, together with all of the other things that were done in connection with the goods, clearly established the commencement of the

[3] *Hammer* v. *Dagenhart,* 247 U. S. 251 (see Pet. 13), involved no question as to when interstate commerce begins. It has, in any event, been overruled. *United States* v. *Darby,* 312 U. S. 100, 115-117.

shipment in interstate commerce. It is noteworthy that in the *Texas and New Orleans Railway case, supra,* the Court, at p. 124, expressly rejected the contention that "freight is never shipped, in the sense of the law, * * * until it is launched upon its final continuous trip to a foreign country."

Nor is any conflict discernible in the case of *United States* v. *Sherman,* 171 F. 2d 619 (C.A. 2), certiorari denied *sub nom. Grimaldi and Whelan* v. *United States,* 337 U. S. 931-932 (see Pet. 17), in which goods stolen from a truck which was delivering them to a dock in New York for shipment to East Africa were held to have been in foreign commerce. There, too, the argument was made that since the goods had not yet come into the possession of the steamship company which was to carry them abroad they had not yet entered foreign commerce, an argument which the court rejected.

CONCLUSION

This case does not involve any conflict of decisions or any question meriting further review. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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